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Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

JUL 14 1961

EIGH CUMMINGS and JoELLEN
CUMMINGS, his wife,
Plaintiffs and Appellants

Clerk, Supreme Court, Utah

vs.

No. 9344

. ELMO ENGLAND, DeLOYD ENG-
LAND, AND BOYD ENGLAND, a
partnership, doing business
under the name and style of
ENGLAND BROTHERS,
Defendants and Respondents

RESPONDENTS' BRIEF IN SUPPORT
OF PETITION FOR REHEARING

ROBERT B. HANSEN
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Respondents

INDEX

STATEMENT OF POINT	2
ARGUMENT	2
CONCLUSION	9

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17-4, 5

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358 P 2d 903-8

Williston on Contracts (3rd Edition) Sec. 60 - 3
Sec. 77 - 3
Sec. 77A - 5, 6
Sec. 78 - 4

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RESPONDENTS' BRIEF IN SUPPORT OF
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Defendants and respondents make this application for a rehearing because they have never had an opportunity to argue the point of law upon which the decision of the above Honorable Court was based. In the lower court and in this one the appellants contended (1) respondents could not exercise their option at the time they did because the option contained in the original agreement of the parties was not subject to acceptance on May 14, 1959, by reason of intervening events and (2) if the option could be exercised at that time the amount of the payment was inadequate to constitute a valid exercise. The decision of this Court, however,

was based on the correctness of the manner in which the exercise of the option was made. Respondents respectfully wish to be heard on that point of law.

STATEMENT OF POINT

THE MANNER IN WHICH RESPONDENTS EXERCISED THEIR OPTION TO PURCHASE APPELLANTS' INTEREST IN THE PROPERTY IN QUESTION PURSUANT TO THE CONTRACT OF MAY 7, 1958, WAS LEGALLY SUFFICIENT.

ARGUMENT

The decision of this Court concluded that there was not a proper exercise by respondents of the option to purchase for the following reasons:

- (1) Respondents' attorney's letter of May 14, 1959, was not an unconditional acceptance of the option.
- (2) Payment of the option price as called for by the contract was not paid in cash by the respondents to the appellants.

As to (1), the question is whether or not the qualification in the letter of May 14, 1959, rendered that acceptance ineffective as a matter of law. The

purpose of that qualification obviously was to avoid waiver of any rights respondents had previously acquired by reason of appellants' failure to make payments according to the terms of the contract and the notice of forfeiture served on appellants as a result.

Sec. 77 of Williston on Contracts (3rd Edition) states that qualified or conditional acceptances are counter offers and reject the original offer. A counter offer, of course, is an offer on different terms than those of the original offer. Here, however, the condition of the acceptance did not relate to the terms of the option - it embraced those terms - (the question as to performance of those terms is the other part of this issue and will be dealt with there) but to the existence of the option itself since it could not be exercised if the contract itself had been discharged by reason of the forfeiture referred to in the qualification. The comment under Restatement of Contracts, Sec. 60, says:

"A qualified or conditional acceptance is a counter offer since such an acceptance is a statement of an exchange that the person making it is to make, differing from

that proposed by the original offeror. A counter offer is a rejection of the original offer. An acceptance, however, is not inoperative as such merely because it is expressly conditional, if the requirement of the condition would be implied from the offer, though not expressed therein."

Since in fact no counter offer was made by the respondents here, it should follow that there was no qualified or conditional acceptance in the sense that such acceptances do not create contractual liability.

In Sec. 78 of Williston on Contracts (3rd Edition) under the subject "Conditions Which Do Not Qualify Offer Do Not Impair Acceptance," it states:

"Sometimes an acceptor from abundance of caution inserts a condition in his acceptance which merely expresses what would be implied in fact or in law from the offer."

As such a condition involves no qualification of the acceptor's assent to the terms of the offer, a contract is not precluded.

The authority just quoted there cites for support thereof the case of Shea vs. Second National Bank, 76 App. DC 406, 133 F2d 17, as follows:

"The general rule is that an acceptance is not inoperative as such merely

because it imposes a condition if the requirement of the condition would be implied from the offer, though not expressed therein (citing restatement and text). . . If it expresses merely what would be implied in fact (authorities) or in law (authorities) from the offer, then it constitutes no qualification of the acceptor's assent."

Respondents respectfully submit that the qualification here in question, namely whether or not the contract and therefore the option were still in existence, is that type of qualification embraced within the rules of law just referred to since it is hard to believe that the parties could have intended the offer of their option to be subject to acceptance unless the contract itself was still enforceable. The condition here would not only be implied in fact from the offer but would be implied in law because the acceptor certainly could not be compelled to perform the contract created by his acceptance unless the offeror could perform his obligations under that contract.

Sec. 77A of Williston on Contracts (3rd Edition) reads as follows:

"Acceptance to Take Effect in the Future.
A nice distinction may be taken here between

,1) a so-called acceptance by which the acceptor agrees to become immediately bound on a condition not named in the offer and (2) an acceptance which adopts unequivocally the terms of the offer but states that it will not be effective until a certain contingency happens or fails to happen. In the first case, there is a counter offer and rejection of the original offer; in the second case there is no counter offer since there is no assent to enter into an immediate bargain. There is, so to speak, an acceptance in error. In the meantime, of course, neither party is bound and either may withdraw. Moreover, if the time at which the acceptance was to become effectual is unreasonably remote, the offer may lapse before the acceptance becomes effective. But if neither party withdraws and the delay is not unreasonable a contract will arise when the contingency happens or stipulated event occurs." (Emphasis added)

Since the condition of the acceptance here was predicated upon past events, it should follow a fortiori that this acceptance created a contract when the condition had already been satisfied.

The appellants ought not to be able to take advantage of a condition to respondents' acceptance when they have always, both at and prior to the time of that condition, maintained the position which satisfies said condition.

As to (2), the question is whether respondents

had to pay the appellants the amount of the option price in cash in addition to the sum which appellants had already received in cash through this transaction which respondents irrevocably and unconditionally released to them. The law, as pointed out in this very decision, does not require the doing of a vain and useless thing. Nothing could be more vain and useless than for respondents to have tendered \$1,597.59 to appellants on September 11, 1959, (the date of May 14, 1959, in the decision is erroneous) which was a month after appellants sued respondents for several times that sum. The decision in this case states that such a futile act would not be required. Therefore, since the appellants were then in possession of more money than they were entitled to by virtue of both the accounting for operating expenses between the parties (and the time that this was ascertained would not affect the fact that it had always been so) and the payment of the option price, the determination of the lower court that the difference belonged to respondents should be affirmed.

The case of Williams vs. Lapey and J. H. Morgan, Sr., 11 Utah 2nd 317, 358 Pacific 2nd 903, cited in the opinion in this case as controlling is not applicable to the facts in this case because respondents here proposed to pay and did pay the exact sum and more required to exercise the option to purchase as found by the lower court, whereas the purchaser in the cited case proposed to pay the option price for four times the number of shares called for by the option in that case.

Since the condition held to render respondents' acceptance ineffective was always claimed to have been satisfied by the appellants and since the lower court and this Court concluded that it had likewise been satisfied also and since this was so at the time the letter of May 14, 1959, was written, it would seem to exult from over substance to say that no contract was formed thereby. It is basic to the law of contracts that neither party is bound until both parties are bound. If subsequent events had made it to appellants' advantage to treat that letter as creating a contract, it is difficult to see how respondents

could have a valid defense to pay the option price under that exercise of their option. If respondents are bound by reason of the condition being then satisfied, the appellants were likewise bound and the decision of the lower court correct.

CONCLUSION

The respondents should have an opportunity to argue fully the point of law upon which the decision in this case was based. If respondents are correct in this point of law, the judgment of the lower court should be affirmed.

Respectfully submitted.

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